

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Amendment of the Commission's Rules
Regarding a Plan for Sharing
the Costs of Microwave Relocation

)
)
) WT Docket No. 95-157
) RM-8643
)

To: The Commission

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REPLY COMMENTS OF UTC

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TABLE OF CONTENTS

	<u>Page</u>
Summary	iii
Comments of UTC	1
I. Cost Sharing Proposal	2
A. Virtually All Parties Support Adoption Of A Cost-Sharing Mechanism.....	2
B. A Mandatory Cost Sharing Formula Should Not Be Adopted.....	5
C. Comments Underscore Need To Provide Compensation For All Reasonable Costs That Benefit Subsequent Licensees	6
D. Commenters Oppose Mandatory Caps	8
E. Most Commenters Support Reimbursement Rights.....	11
F. Bulletin 10-F Is Preferred Method For Determining Interference Under Cost-Sharing Mechanism.....	11
G. Commenters Support Establishment Of Neutral Clearinghouse As Cost-Sharing Administrator.....	12
II. Relocation Guidelines	15
A. The Current Relocation Framework Is Sound And Should Not Be Altered	15
B. The Good Faith Requirement	19
C. Comparable Facilities.....	22
1. Three Primary Factors In Determining Comparability	22
2. Tradeoffs Should Be Purely At The Discretion Of The Incumbent	24
3. Other Aspects Of Comparability	26
III. Twelve Month Trial Period	30

	<u>Page</u>
IV. Licensing Issues	31
A. Interim Microwave Licensing Rules Should Not Be Changed.....	31
B. Incumbent Microwave Systems Should Be Permitted To Operate On A Co-Primary Basis Indefinitely Or Until Relocated Under The 2 GHz Transition Rules	32
V. Conclusion	35

Attachment A

Summary

UTC commends the FCC on its proposal to adopt a cost-sharing mechanism that would facilitate the relocation of microwave systems from the 2 GHz band. UTC notes that virtually all parties, incumbent and PCS alike, support the general cost-sharing concept. UTC recommends that the FCC expand its cost-sharing by permitting incumbents that have entered into relocation agreements for certain links in an integrated system to relocate all links and seek reimbursement from other PCS licensees for the costs of relocating the additional links.

UTC notes that numerous commenters have recommended flexibility in the cost-sharing mechanism and urges the FCC not to adopt a mandatory formula. UTC supports the use of private cost-sharing agreements, but recommends that these agreements be filed with the FCC to address antitrust concerns.

UTC also urges the Commission to listen to the numerous commenters recommending that all reasonable costs be compensable and that no arbitrary cap be imposed. The goal of cost-sharing is and should remain the facilitation of microwave relocation agreements and whole-system change-outs. The strict adherence to an artificial cap will frustrate this goal.

UTC also joins with the majority of commenters in supporting the creation of reimbursement rights, the use of TIA Bulletin 10-F to determine cost-sharing obligations and the establishment of a neutral clearinghouse to administer the cost-sharing

mechanism. Furthermore, UTC and a number of other parties urge the FCC to take steps to ensure the confidentiality of strategic business information by the clearinghouse.

UTC also restates its support for the Commission's proposal not to change the basic transition framework, despite the mischaracterizations being spouted by the PCS industry. UTC urges the Commission not to adopt its proposed definition of "good faith" in that it provides no guidance for either incumbents or PCS licensees and merely begs the question of what constitutes "comparable facilities." Instead, UTC urges the Commission to interpret this term to mean its common, everyday meaning -- an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.

Nearly all commenting parties are in agreement that the three main factors that should determine whether a facility is comparable are: (1) communications throughput; (2) system reliability; and (3) operating cost. However, a number of parties echo UTC's recommendation that the rules afford some flexibility to consider other factors on an individual case basis. However, UTC and other commenters strenuously oppose the suggestion of some PCS licensees that they be allowed to unilaterally "trade-off" system parameters in order to achieve comparable replacement facilities. In addition, UTC renews its request that the FCC clarify that PCS licensees are required to pay any expense incurred by an incumbent that is necessary to ensure the integrity of the entire telecommunications system.

UTC also opposes changes to the FCC's established 2 GHz microwave licensing policies, noting that incumbent licensees must have flexibility to make necessary system

modifications, and cannot be expected to allow their systems to stagnate until a PCS licensee determines that relocation is necessary and thus commences discussions on relocation.

Finally, UTC and others representing the interests of the incumbents uniformly and strenuously object to the FCC's proposal to reclassify incumbents as secondary on a date certain because it would force incumbents in primarily rural areas to subsidize the introduction of PCS and will simply act as an incentive for PCS licensees to wait out the incumbents in the years preceding the termination of the relocation plan.

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To: The Commission

REPLY COMMENTS OF UTC

UTC, The Telecommunications Association (UTC), hereby submits its comments in response to a Federal Communications Commission (Commission) *Notice of Proposed Rule Making (NPRM)*¹ proposing a cost-sharing plan for microwave relocation costs. UTC notes that virtually all commenters support cost-sharing as a way to encourage whole-system change-outs and streamline negotiations. UTC opposes the attempts by the PCS industry to expand the scope of this proceeding in order to change the fundamental transition rules in contravention of stated Commission goals. UTC urges the FCC to retain the flexibility of the current rules and permit the parties to negotiate equitable relocation arrangements.

¹ WT Docket No. 95-157, RM-8643. Reply comments were to be filed by December 21, 1995. However, due to the shutdown of the Federal government, comments could not be filed on this date. By *Public Notice*, DA 96-2, released January 11, 1996, the FCC extended the deadline for filing reply comments to January 16, 1996.

At the outset, UTC would like to restate its objection to the breadth of the proposed rules, which go far beyond those necessary to the implementation of a cost-sharing mechanism. As UTC noted in its comments, "[t]he existing framework was developed with extensive input from the incumbents, the PCS industry and Congress...There is no need to disrupt this carefully-tailored framework simply to satisfy the money-lust of the commercial PCS licensees."²

I. Cost-Sharing Proposal

A. Virtually All Parties Support Adoption of a Cost-Sharing Mechanism

Both the incumbent microwave community and PCS industry support the adoption of a cost-sharing mechanism. In its comments, UTC noted that the adoption of such a cost-sharing mechanism will promote a more orderly transition of incumbent systems, minimize disruption to these systems and reduce the total transition costs.

UTC's comments are echoed by numerous parties. East River Electric Cooperative states that a cost-sharing mechanism will result "in a more efficient and reliable overall [incumbent] system at a lower ultimate cost."³ The Association of American Railroads (AAR) supports cost-sharing as a means of increasing the likelihood of seamless transitions.⁴ The National Rural Electric Cooperative Association (NRECA) agrees, applauding the Commission for the development of this mechanism.⁵ The Industrial Telecommunications

² UTC, p. 4.

³ East River Electric Cooperative (East River), p. 2.

⁴ AAR, p.10.

⁵ NRECA, p. 5.

Association (ITA) argues that the relocation of entire systems through a cost-sharing mechanism will "provide stability for microwave licensees and prevent the needless disruption of existing systems."⁶ Others representing the incumbent microwave industry also support the cost-sharing proposal to encourage whole-system change-outs of incumbent microwave systems.⁷

UTC is encouraged by the wide-spread support for cost-sharing and the recognized benefits of whole-system transitions by the PCS industry. As noted by BellSouth Corporation (BellSouth), many incumbents have multi-link systems and want them relocated as an integral unit.⁸ Omnipoint Communications, Inc. (Omnipoint) supports the cost-sharing mechanism, realizing that efficiencies can be gained by relocating an entire system at once due to savings in relocation costs and negotiation time for all parties.⁹ Sprint Telecommunications Ventures (STV) agrees and notes that in the long run systemic relocations can be more spectrum efficient, less costly and less disruptive.¹⁰ The Personal Communications Industry Association (PCIA) states that the cost-sharing formula will encourage the efficient relocation of microwave users, expedite PCS, simplify the relocation process and facilitate system-wide

⁶ ITA, p. 7.

⁷ See also Tenneco Energy (Tenneco), p. 2; DCR, pp. 8-9; Central Iowa Power Cooperative (CIPCO), p. 1; The Southern Company (Southern), p. 3; Alexander Utility Engineering, Inc. (Alexander), p. 1; City of San Diego, p. 3; Interstate Natural Gas Association of America (INGAA), p. 1; L.A County Sheriff (LA County), p. 2; Valero Transmission (Valero), p. 2.

⁸ BellSouth, p. 2.

⁹ Omnipoint, p. 2.

¹⁰ STV, p. 23.

relocations.¹¹ Even the unlicensed PCS administrator, UTAM, Inc. (UTAM), supports the adoption of a cost-sharing mechanism.¹²

To further the FCC's stated goal of facilitating the relocation of entire microwave systems, UTC recommends that the FCC expand its cost-sharing proposal to permit participation by incumbents. Incumbents which have entered into relocation agreements for certain links in an integrated system should be given the opportunity to relocate all links and seek reimbursement from other PCS licensees for the costs of relocating the additional links. Incumbents would be subject to the same rules as PCS licensees, including any limitations on compensable costs. Upon relocation of the links, the incumbent would obtain interference rights and would be able to mandate cost-sharing from any subsequent PCS licensee that would have been affected by those links (as defined by the appropriate interference standard).

By permitting incumbents to participate in cost-sharing, the FCC will not only encourage the relocation of incumbent systems in the most efficient and least disruptive manner, but will also speed up the deployment of PCS. PCS licensees subject to cost-sharing with incumbents will not face lengthy negotiations over comparable facilities or the installation or testing thereof. Relocation costs will be known and once an agreement is reached, the PCS licensee can immediately begin operations.

¹¹ PCIA, pp. 9-10.

¹² This is particularly remarkable because the deployment of unlicensed PCS has been based on an assumption that many of the costs of microwave relocation from the unlicensed band would be borne by the licensed PCS providers.

B. A Mandatory Cost-Sharing Formula Should Not Be Adopted

Numerous commenters representing both incumbents and PCS licensees oppose the imposition of a rigid cost-sharing formula. As UTC stated in its comments, the mandatory formula proposed by the FCC in the *NPRM* would be difficult to apply to certain situations, including those involving non-cash settlements and lump-sum payments. Instead, UTC suggested that, once the clearinghouse identifies which licensees will benefit from the relocation of a particular link, the PCS licensees involved would be required to negotiate over the allocation of relocation costs. UTC suggested that the cost-sharing formula could be used as a voluntary guideline for determining an equitable allocation.¹³

Commenters agree that there should be flexibility in the allocation of cost-sharing obligations. GTE Service Corporation (GTE), STV, AT&T Wireless Services, Inc. (AT&T), PCS PrimeCo, L.P. (PrimeCo) and PCIA all urge the FCC to permit private cost-sharing agreements to supersede any cost-sharing formula adopted in this proceeding.¹⁴ As STV notes, private agreements "promise to expedite the process of cost-sharing by permitting the parties to voluntarily modify the procedures that may be used in connection with relocation cost-sharing."¹⁵

UTC agrees with these commenters that private agreements should be permitted. However, UTC is concerned about the antitrust implications and possible price signaling that may occur through these agreements among potential competitors. Due to the nature of these

¹³ UTC, p. 8-9.

¹⁴ GTE, p. 4-5; STV, p. 31; AT&T, p. 6; PrimeCo, p. 14-15; PCIA, p. 37.

¹⁵ STV, p. 31.

agreements, UTC recommends that all private agreements be filed with the FCC and available for public inspection. In addition, the FCC should protect incumbents from private relocation agreements which serve to set an upper limit on the costs that will be paid to incumbents for relocation. Cost-sharing agreements should operate independently of the obligations of the PCS licensees to provide incumbents with comparable facilities, regardless of the cost.

C. Comments Underscore Need to Provide Compensation For All Reasonable Costs That Benefit Subsequent Licensees

In the *NPRM*, the Commission proposes to limit the application of the cost-sharing mechanism to only certain costs. In its comments, UTC strongly disagreed with the Commission proposal and urged that all reasonable costs be compensable under the cost-sharing mechanism.¹⁶

This view is shared by many parties. As the American Petroleum Institute (API) states in its comments, reimbursable costs must not be so narrowly defined to as to limit free and open negotiations.¹⁷ The need to broaden the category of compensable costs is further supported by NRECA and East River Electric Cooperative, which urge the FCC to clarify that the list of compensable costs is illustrative and not exhaustive.¹⁸ Moreover, Southern California Gas (SCG) and Central Iowa Power Cooperative (CIPCO) note that reasonable legal costs should also be considered compensable costs.¹⁹

¹⁶ UTC, pp. 10-11.

¹⁷ API, p. 7.

¹⁸ NRECA, p. 5; East River Electric Cooperative, p. 2.

¹⁹ SCG, p. 7; CIPCO, p. 1.

UTC opposes those PCS licensees and applicants who are hoping to limit cost-sharing and thereby frustrate the Commission's goals of streamlining the negotiations process and facilitating the relocation of microwave systems. The comments of parties that suggest that PCS licensees be permitted to pay equipment costs only, such as Omnipoint Communications, Inc. (Omnipoint), will frustrate the relocation process by unnecessarily excluding costs which are directly associated with the relocation.²⁰ UTC recommends that the FCC not impose an arbitrary limit on the types of costs that are reimbursable so long as they are reasonable and related to the relocation of incumbent systems.

UTC strongly disagrees with the comments of GO Communications Corporation (GO) that suggest it is very unlikely that disallowing reimbursement of premiums will inhibit relocation agreements.²¹ The adoption of a cost-sharing mechanism will have a direct and immediate effect on relocation negotiations. Unnecessary limitations on cost-sharing will stifle negotiations and set artificial limitations on comparability and relocation compensation.

UTC supports the compensable cost concept found in the private cost-sharing arrangement entered into between GTE, AT&T, STV, PrimeCo and PhillieCo which assumes that all relocation costs under a specified amount are compensable. This assumption will facilitate negotiations among PCS licensees for cost-sharing purposes by eliminating the need to review individual cost elements in many cases. In turn, this will facilitate negotiations over relocation agreements and will speed up the deployment of PCS. UTC does not support

²⁰ Omnipoint, p. 6.

²¹ GO, p. 4.

setting this specified amount as a "cap" on relocation costs. Reasonable relocation costs exceeding this benchmark should still be compensable even though the assumption will not apply to these amounts.

D. Commenters Oppose Mandatory Caps

In the *NPRM*, the Commission proposes \$250,000 per link cap on compensable costs.²² UTC strongly disagreed, noting that the "Commission is mistaken if it believes that such a cap will not affect negotiations with incumbents or that it will not result in many incumbents having to pay part of their own relocation expenses."²³

Opposition to the proposed cap is widespread. The Association of American Railroads (AAR) notes that the proposed cap would have a chilling effect on negotiations.²⁴ Southern California Gas opposes an artificial cap for the same reason -- because it would serve as a disincentive for PCS providers to effect a comprehensive relocation of incumbents.²⁵ Valero Transmission (Valero) notes that imposition of a cap could severely restrict negotiations since PCS licensees will be reluctant to negotiate expenses that exceed the cap.²⁶ The Association of Public-Safety Communications Officials-International, Inc. (APCO) points out that the adoption of a specific cap will "bless" this amount as the target for all negotiations.²⁷

²² *NPRM*, ¶43. An additional \$150,000 is compensable if a new tower is required.

²³ UTC, p. 12.

²⁴ AAR, p. 12.

²⁵ SCG, p. 4.

²⁶ Valero, p. 3.

²⁷ APCO, pp. 13-14.

Many of the PCS licensees also recognize the need to permit cost-sharing for amounts exceeding the artificial cap. GTE, for instance, notes that no caps are necessary as long as relocation costs are documented.²⁸ STV supports a "soft" cap, under which expenses exceeding the proposed cap are compensable.²⁹ Furthermore, the private cost-sharing agreement entered into between GTE, STV, AT&T, PrimeCo and PhillieCo provides no cap on reimbursement expenses. UTC urges the FCC to eliminate the cap on compensable costs and permit parties to negotiate equitable cost-sharing arrangements.

If the FCC does impose an artificial cap, UTC and numerous other parties urge the Commission to raise the specified amount.³⁰ SCG joins UTC in expressing concern that a cap based on average costs is likely to result in costs exceeding the cap in a substantial number of cases.³¹ Tenneco Energy correctly points out that the cap is improperly based on information from a study completed four years ago and based on contacts with only a handful of associations and manufacturers.³² Parties such as Valero and API note that the \$250,000 per link cap is woefully inadequate, and support the cap of \$600,000 per link originally proposed by Pacific Bell Mobile Services (PBMS) in its *Petition for Rulemaking*.³³

UTC joins with other parties in urging the FCC to clarify that any cap imposed on cost-sharing should not apply to relocation agreements between incumbents and PCS

²⁸ GTE, p. 15.

²⁹ STV, p. 27.

³⁰ UTC also supports the comments of NRECA, CIPCO and East River that any specified cap include an adjustment factor based on the Consumer Price Index.

³¹ SCG, p. 7.

³² Tenneco, p. 13.

³³ Valero, p. 3; API, p. 10.

licensees.³⁴ The Commission must clarify that the safeguards it has adopted for incumbents in the 2 GHz band, namely reimbursement for all relocation costs to comparable facilities, is unaffected by the cost-sharing mechanism. While UTC strongly believes that the cost-sharing mechanism will affect negotiations, the FCC must warn PCS licensees that restrictions on cost-sharing are not to be construed as restrictions on compensable costs to incumbents. As Western Wireless Corporation (Western) points out, "System comparability -- not the cap amount -- should be the primary focus of all relocation discussions."³⁵

Finally, UTC requests that, if a cap is imposed, the Commission establish a procedure under which a PCS licensee could request a waiver of the cap in certain cases. Incumbent systems are unique and each relocation will involve different cost factors. The Commission should encourage the relocation of entire microwave systems and not unfairly discriminate against those systems that exceed average relocation costs. The goal of cost-sharing is and should remain the facilitation of microwave relocation agreements and whole-system change-outs. The strict adherence to an artificial cap will frustrate this goal.

E. Most Commenters Support Reimbursement Rights

The vast majority of commenters weighing in on the issue of reimbursement rights join UTC in supporting the creation of these rights as proposed in the *NPRM*.³⁶

Reimbursement rights provide a mechanism for enforcement of cost-sharing obligations

³⁴ Alexander, pp. 2-3; San Diego, p. 5

³⁵ Western, p. 6.

³⁶ STV, p. 29; US Airwaves Inc., p. 4; Western, p. 7; PBMS, p. 4; PCIA, p. 34; NRECA, p. 5; API, p. 5.

between PCS licensees but exist separately from the operating and non-interference rights attached to the incumbent's 2 GHz license. These reimbursement rights provide an easily administered enforcement mechanism which benefits PCS licensees without interfering with an incumbent's rights pursuant to its 2 GHz license.

F. Bulletin 10-F Is The Preferred Method For Determining Interference Under Cost-Sharing Mechanism

The majority of commenters support the use of TIA Bulletin 10-F to determine cost-sharing obligations between PCS licensees.³⁷ Furthermore, commenters representing both PCS and incumbent interests have joined UTC to urge the Commission to consider adjacent channel interference in the cost-sharing analysis.³⁸ API states that the cost-sharing analysis should include both co-channel and adjacent channel interference and should permit reimbursement wherever the subsequent licensee would have interfered with the microwave licensee.³⁹ The Fixed Point-to-Point Communications Section of the Network Equipment Division of the Telecommunications Industry Association (TIA) also urges the Commission to incorporate adjacent channel interference in its cost-sharing mechanism, noting that the exclusion of adjacent channel interference will erode the protection that the rules provide from this type of interference.⁴⁰ DCR Communications, Inc. (DCR), a C Block applicant, notes that both the relocater and subsequent PCS licensees "would receive a genuine and valuable

³⁷ DCR Communications, Inc. (DCR), p. 6; PBMS, p. 5; Western, p. 8; PCIA, pp. 35-6; US Airwaves, p. 4; SBMS Southwestern Bell Mobile System, Inc. (SBMS), p. 6; BellSouth, pp. 16-17; TIA, pp. 2-4; API, p. 6; Southern, p. 9.

³⁸ AAR, p. 12; Southern, p. 9.

³⁹ API, p. 6.

⁴⁰ TIA, p. 5.

benefit from the relocation of an incumbent that would have caused adjacent channel interference."⁴¹

UTC opposes those in the PCS industry who seek to limit the application of the interference analysis to co-channel interference only.⁴² The FCC's rules regarding the deployment of PCS provide that all interference to incumbent systems must be considered, both co-channel and adjacent channel. In order to allocate costs effectively and to truly facilitate the relocation of entire systems, the cost-sharing mechanism must operate based on the same principles as the relocation process. All reasonable costs paid by PCS licensees for relocations must be compensable. UTC agrees with DCR that it would be unwise for the Commission to minimize the significance of adjacent channel interference just to "simplify the administration of the cost-sharing plan."⁴³

G. Commenters Support Establishment Of Neutral Clearinghouse As Cost-Sharing Administrator

A number of parties, including UTC, support the establishment of an administrative body to manage the cost-sharing mechanism. This "clearinghouse" will collect appropriate cost data and determine which licensees should participate in cost-sharing negotiations. In its comments, UTC outlined the principles that it felt were essential in a clearinghouse, noting that the clearinghouse must be financed by the PCS industry, neutral and open to participation

⁴¹ DCR, p. 6.

⁴² PCIA, p. 30; BellSouth, p. 16-17; Western, pp. 8-9; PBMS, p. 5.

⁴³ DCR, p. 6.

by the incumbent community. It must also maintain the confidentiality of sensitive business information.⁴⁴

Numerous commenters support these basic principles. The Southern Company (Southern) notes that the clearinghouse must be neutral and not simply an arm of the PCS industry.⁴⁵ API urges that the clearinghouse be administered by a neutral third party.⁴⁶ BellSouth agrees and urges the FCC to consider not only the administrator's independence, but also other factors such as whether it is non-profit and able to ensure confidentiality.⁴⁷

The need for confidentiality was echoed by incumbents and PCS licensees alike. The Association of American Railroads (AAR) recommends that the clearinghouse be designed, maintained and operated to guarantee the security of confidential information.⁴⁸ The Cellular Telecommunications Industry Association (CTIA) urges the FCC to protect the confidentiality of commercially sensitive information that should not be shared by competitors.⁴⁹ ITA notes the need for the clearinghouse to explain in detail how it would satisfy the claims raised by UTC regarding confidentiality.⁵⁰

UTC disagrees with Southwestern Bell Mobile Systems, Inc.'s (SBMS) attempt to downplay the importance of confidentiality by reasoning that cost-sharing contracts must be

⁴⁴ UTC, p. 16.

⁴⁵ Southern, p. 11.

⁴⁶ API, p. 11.

⁴⁷ BellSouth, p. 15.

⁴⁸ AAR, p. 13.

⁴⁹ CTIA, p. 7, n. 11.

⁵⁰ ITA, p. 8.

accessible to other licensees who may have to share in the costs.⁵¹ This is not true. UTC recommended in its comments that any pertinent cost-sharing information could be provided in the form of summaries of the pertinent sections of these contracts.⁵² This idea was further supported by Southern in its comments.⁵³ There is no need for the actual contracts to be submitted in order to administer cost-sharing.

UTC strongly opposes the suggestion of PCIA that it be designated as the clearinghouse.⁵⁴ The administration of the cost-sharing plan can and will have a great deal of impact on the relocation negotiations. As noted elsewhere in UTC's comments, the availability of cost-sharing and the limitations imposed on its availability (through rulemaking or administration) will affect how much PCS licensees are likely to pay incumbents and will determine which paths are to be relocated. In order to ensure fairness in this administration, UTC recommends that the FCC designate a neutral third party which represents neither the PCS nor incumbent industries.

For the same reasons, UTC also opposes the suggestion of SBMS that the clearinghouse be designated by one of the trade organizations representing the PCS industry.⁵⁵ Neutrality of the clearinghouse is vital to ensuring the equitable administration of the cost-sharing mechanism and to maintaining confidentiality of strategic business information that may be disclosed during the process.

⁵¹ SBMS, p. 9.

⁵² UTC, p. 17.

⁵³ Southern, p. 11.

⁵⁴ PCIA, p. 40.

⁵⁵ SBMS, p. 9.

UTC is intrigued by the suggestion made by several parties that the clearinghouse be designated through a competitive bidding process. AT&T, for instance, recommends competitive bidding to reduce the costs of the clearinghouse.⁵⁶ ITA also recommends competitive bidding as a way to ensure that all interested parties have an opportunity to participate and to ensure that the clearinghouse functions efficiently.⁵⁷ UTC believes that there is some merit to using competitive bidding to designate the clearinghouse as long as the amount bid is not the only consideration. UTC urges the FCC to require each applicant to satisfy the general principles outlined in UTC's comments (i.e., neutrality, incumbent participation, confidentiality).

II. Relocation Guidelines

A. The Current Relocation Framework is Sound and Should Not Be Altered

In the *NPRM* to this docket, the FCC observed that --

[T]he existing relocation procedures for microwave incumbents adopted in the *Emerging Technologies* docket were the product of extensive comment and deliberation prior to the initial licensing of PCS. We emphasize that our intent is not to reopen that proceeding here, because we believe that the general approach to relocation in our existing rules is sound and equitable. . .⁵⁸

The FCC correctly reached this conclusion even after the two trade associations currently competing for leadership of the PCS industry had engaged in a campaign to outdo one another with allegations of “abuse” and “bad faith” on the part of incumbents during the first few

⁵⁶ AT&T, p. 6.

⁵⁷ ITA, p.

⁵⁸ *NPRM*, para. 3.

months of negotiations under the relocation rules. Dressed in “bloody shirts” and “ski masks,” the PCS licensees and their trade associations presented the FCC with a litany of anecdotes having as a central premise the fact that microwave incumbents (1) were actually engaging in negotiations with PCS licensees over the terms and conditions for relocation, and (2) were refusing to be bullied by PCS licensees into accepting whatever the PCS licensees considered “reasonable.”

Several PCS commenters have renewed their requests that the FCC reconsider in this docket the basic transition framework adopted in ET Docket No. 92-9. PCS commenters have variously suggested that the voluntary negotiation period should be eliminated;⁵⁹ that it should be reduced to one year;⁶⁰ or that it should be converted into a “mandatory” negotiation period.⁶¹ One PCS association even argues in support of such changes that all PCS commenters in Docket 92-9 had suggested shorter negotiation periods, completely ignoring the fact that its competing PCS association, CTIA, had recommended that the period for negotiations should be as long as possible, and -- 15 years at a minimum!⁶²

For all of the reasons that the FCC declined to include these suggestions in this docket, UTC urges the FCC again to reject these requests. The experience to-date indicates that the vast majority of negotiations are being conducted in good faith, incumbents are not refusing to negotiate, and microwave systems are being relocated.⁶³ Some of the PCS licensees admit

⁵⁹ PCIA, p. 14.

⁶⁰ SBMS p. 3.

⁶¹ AT&T, p. 15; GO Communications, p. 7 and n.17.

⁶² See Comments of CTIA, filed June 5th, 1992, in ET Docket No. 92-9, p.4.

⁶³ STV alleges that UTC Service Corporation (UTC*SC), in materials promoting its relocation consulting service for microwave incumbents, incites microwave incumbents to hold up PCS for ransom. (STV, p. 9.) To

in their comments that they are successfully concluding relocation agreements with incumbents.⁶⁴ UTC believes that other PCS licensees would also have to admit that they have successfully concluded relocation agreements.⁶⁵

Incredibly, many of the purported examples of “abuse” cited by the PCS industry involved requests by microwave incumbents to have their entire systems replaced at one time rather than on a piecemeal basis. While expressing righteous indignation at the incumbents’ requests for whole-system change-outs, the PCS industry now offers overwhelming support for the adoption of rules that would, in fact, facilitate negotiations over whole-system change-outs. PCS licensees, as well as microwave incumbents, support the adoption of cost-sharing rules in this docket because they will facilitate whole-system change-outs, simplify the relocation process and more quickly lead to clearing of the 2 GHz band for PCS.⁶⁶ From this it can be seen that it is not unreasonable or unconscionable for microwave incumbents to ask for complete system change-outs; rather, the problem has been the reluctance of PCS licensees to agree to such requests given the “free rider” problem.

the contrary, an objective reading of this brochure indicates that UTC*SC was entirely accurate in predicting, before the PCS auctions had even begun, that the auction winners would likely be “big money” players who would move aggressively to recoup their investment, and that microwave incumbents who are unfamiliar with the relocation rules or uncertain of how they will relocate from 2 GHz will be easy targets for super-motivated telecommunications giants. Recent actions by the well-heeled PCS licensees to bully incumbents and rewrite the relocation rules bear out UTC*SC’s predictions. Nowhere does UTC*SC state or imply that incumbents should hold-out for “big money,” despite STV’s characterizations to the contrary.

⁶⁴ AT&T, p. 10; STV, pp. 7-8.

⁶⁵ Because of confidentiality agreements mutually agreed to by the parties to most relocation agreements, it has been difficult to present evidence of “success stories” to counter the PCS industry’s anonymous “ski mask” examples.

⁶⁶ See, e.g., PCIA, pp. 9-10; CTIA, pp. 4-5; BellSouth, pp. 2 & 5; Omnipoint, p.2; GTE, p. 4; PBMS, p. 1; STV, p.23.

The PCS industry has also alleged that some incumbents request payments that exceed the amounts PCS licensees are willing to pay.⁶⁷ Such differences of opinion during negotiations are to be expected; indeed, it is the rare agreement in which both parties come to the table with exactly the same goals and expectations. If anything, the scenarios painted by the PCS industry prove too much; that is, they prove that negotiations are occurring, that microwave incumbents understand their rights as well as their responsibilities under the transition rules, and that PCS licensees are free to reject any requests they consider unreasonable.

The PCS industry fails to point out that under the current rules, incumbents cannot “hold up” PCS licensees beyond the voluntary negotiation period, and that PCS licensees are always free to use engineering solutions to build their systems around incumbent microwave systems. The PCS industry is also inconsistent by arguing on the one hand that incumbents should accept whatever offers are placed on the table by PCS licensees, while arguing on the other hand that incumbents should be allowed to “negotiate freely” over issues such as waivers of rights to relocate back to the 2 GHz band during the 12-month testing period.⁶⁸ It is simply unreasonable for the PCS industry to want it both ways.

⁶⁷ Some PCS commenters point to a study that projects a \$2 billion shortfall to the US Treasury if incumbents are allowed to negotiate over relocation rights. No credence should be afforded the conclusions of this study because it relies on three incredible assumptions: (1) every microwave licensee will demand \$1 million per path to relocate; (2) every PCS licensee will be willing to pay \$1 million per path and (3) every bidder at auction will devalue its bid by a factor of \$1 million for every microwave path in its desired spectrum block(s). Undercutting these assumptions are the examples presented by the PCS industry itself; *i.e.*, the vast majority of microwave incumbents are not requesting \$1 million premiums, nor are PCS licensees agreeing to such requests. This is just another example of the PCS industry’s hyperbole and double-talk.

⁶⁸ See, e.g., AT&T, p. 12.

Not included in the examples cited by the PCS industry are the greater number of situations where PCS licensees have not even contacted microwave incumbents about relocation, or where the parties have been able to promptly and successfully negotiate relocation agreements. The FCC may take official notice of the fact that commercial PCS service is now available throughout the greater Washington/Baltimore area on frequencies that were, until recently, licensed and used for point-to-point microwave operations.

For all of these reasons, the FCC should deny the PCS commenters' requests for further changes in the transition rules.

B. The Good Faith Requirement

While all of the incumbent microwave licensees expressed willingness to negotiate in “good faith” during the “mandatory negotiation” phase of the transition process, they were uniform in their opposition to defining good faith in a manner that would restrict the ability of the incumbents to engage in actual negotiations. Specifically, there was strong opposition to the Commission’s suggestion that a microwave licensee’s failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith.⁶⁹ As AAR notes, the proposal would convert arms-length negotiations into a contract of adhesion whereby some of the largest and most powerful companies in the world could dictate the terms of the accord.⁷⁰

⁶⁹ AAR, p. 14; APPA, p. 3. LA County, p. 3; NRECA, p. 6; Williams Wireless Inc. (WWI), p. 4.

⁷⁰ AAR, p. 14.